

INTRODUCTION

OUTSIDE THE BOX: EXPANDING THE SCOPE OF ANIMAL LAW

By
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Maybe it was the Oregon microbrews. Perhaps it was the Rogue River Blue, the Tumalo Antigo, or the other Oregon cheeses we had arranged on the table. It may have even been the organic, seasonal pizza that we ordered in. *Something* was making this get-together a particularly productive event. Our guests hailed from across the nation and were in Portland for the 72nd North American Wildlife and Natural Resources Conference, an annual professional gathering for wildlife management professionals (mostly government wildlife managers).¹ After the day's official conference events, Oregon hosted attending lawyers for eats and conversation.

We had one thing in common: Each of us served as legal counsel to a state wildlife agency. That made us members of a rare and reclusive subspecies, participants in a highly specialized subculture within the legal community. Each state employs at least one wildlife lawyer, resulting in a grand total of perhaps sixty in the entire United States. Some of us are in-house counsel, providing legal advice as an employee of the wildlife agency itself. Others (as here in Oregon) work for the

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¹ See generally Wildlife Mgt. Inst., *73rd North American Wildlife and Natural Resources Conference*, http://www.wildlifemanagementinstitute.org/index.php?option=com_content&view=article&id=126&Itemid=61 (accessed Apr. 13, 2008) (providing information regarding the Wildlife Management Institute's North American Wildlife and Natural Resources Conference).

Attorney General and are assigned to represent the wildlife agency as general counsel.

Despite these variations, our job descriptions are essentially identical—provision of day-to-day legal advice to the people who make and implement state wildlife policy. Most of our clients are biologist-bureaucrats, from top level managers riding desks in large urban offices to field staff spending much of their working hours afoot in remote country. But we also represent state wildlife commissions, the volunteer citizen panels that meet in public on a regular basis to make the policy that the “biocrats” then implement on the ground. While many of our agency clients are public figures in their particular states, we state wildlife lawyers tend to fly under the radar. We do not make policy; we just counsel and represent the policymakers.

Our shared specialty provided fruitful ground for discussion that evening. Over by the window, Oregon, Kansas and Tennessee talked up chronic wasting disease (CWD) and the risk it poses to native deer and elk.² Hovering near the beverage table were California, Wisconsin, Alaska and Utah, swapping war stories about legislative efforts to codify a “right to hunt.”³ Arizona and Washington noted the rising tide of tort litigation against states arising from bear attacks on humans,⁴ while Nevada and Vermont debated the efficacy of the Wildlife Violator Compact.⁵ As the evening progressed, we explored the commonalities of our work as state wildlife counsel.

No one in the room that night would have self-identified as an “animal lawyer.” In fact, when I mentioned that students at my alma mater published a law review called *Animal Law*, nary a person there had heard of it. By the same token, the typical reader of *Animal Law* may know (or care) little about state wildlife lawyers. It may appear that the lofty world of animal law does not intersect the mundane world of state wildlife lawyers. Consider this issue of *Animal Law*. It

² See generally Chronic Wasting Disease Alliance, *Learn About CWD*, <http://www.cwd-info.org/index.php/fuseaction/about.main> (accessed Apr. 13, 2008) (discussing chronic wasting disease generally).

³ See generally St. Env'tl. Resource Ctr., *Issue: "Right to Hunt and Fish" Laws*, <http://www.serconline.org/huntandfish.html> (last updated Mar. 16, 2004) (discussing the potential negative impacts of legislative efforts to establish a “right to hunt”); Darren LaSorte, *Will State Constitutions Protect the Future of Hunting?*, <http://www.nraila.org/hunting/read/huntingarticles.aspx?ID=256> (accessed Apr. 13, 2008) (last updated Nov. 16, 2007) (asserting that constitutional amendments will best protect hunting rights).

⁴ See e.g. *Knochel ex rel. Knochel v. U.S.*, 49 F.Supp. 2d 1155 (D. Ariz. 1998) (suit brought by the family of a child mauled by a bear in a National Park); Sara Israelsen-Hartley, *Family of Boy Killed by Bear Files Lawsuits Against State, Federal Agencies*, *Deseret Morn. News* (Mar. 28, 2008) (available at <http://deseretnews.com/article/1,5143,695265555,00.html>) (discussing lawsuit recently filed by the family of a boy killed by a bear in a Utah campground).

⁵ Or. Rev. Stat. § 496.750 (2003); see also generally Ga. Dept. of Nat. Resources, *Interstate Wildlife Violator Compact*, <http://georgiawildlife.dnr.state.ga.us/content/displaycontent.asp?txtDocument=310> (accessed Apr. 13, 2008) (discussing the Interstate Wildlife Violator Compact).

includes thoughtful articles on animal rights theory, dog meat in Korea, national standards for organic milk, and Japanese dolphin hunts. And yet, those unfamiliar with our work might be surprised by the variety of animal law issues we state wildlife lawyers address—issues that can be just as challenging. Here are a few examples:

Hunting and trapping regulation. This is the bread and butter of a state wildlife lawyer's practice. Increasingly, this mix of legal issues includes what might be called "social" or "ethical" policy concerns, with these concerns often brought forward by hunters. Drawing upon the philosophical foundations of "fair chase,"⁶ some state wildlife commissions have banned or restricted particular methods of hunting.⁷ Typically, state wildlife commissions have broad discretion to regulate the time, place and manner of hunting or trapping. The trickier professional challenge for the state wildlife lawyer is crafting administrative rule language that precisely describes the particular hunting or trapping method to be banned or restricted.

For instance, although a number of states ban "canned hunts," states vary widely in how they define the term.⁸ Similarly, state wildlife commissions often referee conflicts between different categories of hunters, and many states set aside special hunting seasons limited to particular hunting methods such as muzzleloader firearms or archery.⁹ This can spawn debates over who qualifies to participate in such hunts. Sometimes, these debates include ethical undercurrents, partic-

⁶ See generally Hunt Fair Chase, *Why a Website on Hunting Ethics?*, <http://huntfairchase.com/index.php/fuseaction/ethics.why> (accessed Apr. 13, 2008) (fair chase is "the ethical, sportsmanlike, lawful pursuit and taking of free-ranging wild, native . . . big game animals in a manner that does not give the hunter an improper advantage over such animals"); Orion: The Hunter's Institute, <http://www.huntright.com> (accessed Apr. 13, 2008) (providing information about the history and ethics of fair chase hunting).

⁷ The Wildlife Mgt. Inst., *Questions and Answers on Chronic Wasting Disease for Hunters* (July 9, 2007) (available at <http://www.cwd-info.org/index.php/fuseaction/resources.main>; *select CWD Brochure*); see Or. Dept. of Fish & Wildlife, *Fish and Wildlife Commission Bans Mechanical Decoys*, <http://www.dfw.state.or.us/public/NewsArc/2002News/October/101402news.htm> (Oct. 11, 2002) (citing principles of fair chase, mechanical decoys restricted in waterfowl hunting and banned in big game hunting in Oregon).

⁸ See generally Humane Socy. of the U.S., *Canned Hunts: Unfair at Any Price* 17–58, (available at http://www.hsus.org/web-files/PDF/2005_canned_hunt_report.pdf) (Jan. 2005) (a survey of state laws pertaining to shooting reserves reveals several states limit the type of species (such as game birds) that can be killed while others may permit the shooting of big game and exotic species or ban the establishment of new shooting enclosures); Boone and Crockett Club, *Canned Shoot Statement*, http://www.boonecrockett.org/huntingEthics/ethics_cannedshoot.asp?area=HuntingEthics (accessed Apr. 13, 2008) (condemning "the pursuit and killing of any big game animal kept in or released from captivity to be killed in an artificial or bogus 'hunting' situation where the game lacks the equivalent chance to escape afforded free-ranging animals, virtually assuring the shooter a certain or unrealistically favorable chance of a kill").

⁹ See e.g. Del. Code Ann. tit. 7, § 704 (Lexis 2001) (muzzle loading pistols may be used during primitive weapons season); Ga. Code Ann. § 27-3-4 (2007) (certain types of bows and certain muzzleloading firearms may be used during primitive weapons sea-

ularly when users of low-tech weapons accuse users of high-tech weapons of violating "fair chase" principles.¹⁰

Threatened and endangered species. With attention typically focused on the federal Endangered Species Act (ESA), many forget that several states (including Oregon)¹¹ have their own ESAs.¹² Some state ESAs restrict private action, as well as action by state agencies.¹³ The most recent example of restrictions imposed by Oregon's ESA was the Oregon Fish and Wildlife Commission's adoption in 2005 of the Oregon Wolf Conservation and Management Plan.¹⁴ Additionally, when federal authorities delist or downlist a species, the regulatory spotlight can shift to the states.¹⁵ State wildlife lawyers also deal with disputes over state listing or delisting decisions and assist with the development of state conservation regulations.

Wildlife Violator Compact. With twenty-six member states,¹⁶ the Wildlife Violator Compact (the Compact) is a cooperative effort to beef up the deterrent sting against poachers and others who violate wildlife laws. Oversimplified, the Compact ensures that if a resident of state X violates the wildlife laws while hunting in state Y, both states can suspend that person's hunting privileges.¹⁷ State wildlife lawyers assist in drafting rules that implement the Compact in their states, as well as handle the administrative hearings that result when the Compact is invoked and privileges are suspended.

Protection against disease. Many states have regulations in place to protect wildlife from communicable diseases such as bovine tuberculosis or chronic wasting disease (CWD). Currently, most atten-

sons); Miss. Code Ann. § 49-7-31 (Lexis 1999) (open season on deer varies with respect to when bow and arrow or guns may be used).

¹⁰ Dave Ware, *Hunter Ethics and Fair Chase*, Wash. Hunting News (newsltr. of Wash. Dept. of Fish & Wildlife) 5 (Sept. 2002) (available at <http://wdfw.wa.gov/wlm/game/hunter/gametrails/2002/wagt02.pdf>).

¹¹ Or. Rev. Stat. §§ 496.171-182; 498.026 (1995).

¹² St. Env'tl. Resource Ctr., *Protecting Endangered Species Fact Pack*, <http://www.serconline.org/esafact.html> (last updated Aug. 10, 2004).

¹³ E.g. Or. Rev. Stat. § 498.026(1); see also Or. Rev. Stat. § 496.182 (agencies required to notify state department of wildlife and implement recommendations if proposed action may violate guidelines promulgated under the state ESA).

¹⁴ Or. Admin. R. 635-110-0000-0040 (2008); Or. Dept. of Fish and Wildlife, *Wolf Conservation & Management Plan* (available at http://www.dfw.state.or.us/Wolves/FINAL/wolf_plan.pdf) (Dec. 2005); see Or. Dept. of Fish and Wildlife, *What Federal Wolf Delisting Means for Oregon's Livestock Producers*, <http://www.dfw.state.or.us/news/2008/march/032108b.asp> (Mar. 21, 2008) (discussing the interaction between the Wolf Conservation & Management Plan and wolf delisting).

¹⁵ See e.g. Va. Dept. of Game & Inland Fisheries, *Federal Delisting of Eagles Effective July 28, Still Protected at State Level*, <http://www.dgif.virginia.gov/news/release.asp?id=133> (July 9, 2007) (discussing Virginia's protection of bald eagles).

¹⁶ Ga. Dept. of Nat. Resources, *supra* n. 5.

¹⁷ Or. Rev. Stat. §§ 496.750(I)(b); 497.415(4) (2008).

tion is focused on CWD, a contagious neurological disease¹⁸ affecting deer and elk in eleven states and two Canadian provinces.¹⁹ Regulations to guard against CWD sometimes involve bans on the import of live cervids or restrictions on the import of cervid parts from states with CWD.²⁰ Such import restrictions have spawned litigation involving Commerce Clause challenges.²¹ Concerns over CWD have led some state wildlife agencies to tighten regulation of private commercial deer and elk ranches²² and have moved some hunting, animal rights, and environmental organizations to propose banning such ranches altogether.²³

Protection against invasive species. Some state wildlife agencies aim to protect native wildlife and their habitat from invasive, introduced wildlife species by regulating the types of animals that may be held by private parties.²⁴ For example, Oregon's "wildlife integrity" rules²⁵ establish a Wildlife Integrity Review Panel of biologists and others that recommends to the Commission categorizing species (as prohibited, controlled, or noncontrolled) based upon the risk they would pose if released into the wild.²⁶

¹⁸ U.S. Dept. of Agric. APHIS, *Chronic Wasting Disease*, http://www.aphis.usda.gov/animal_health/animal_diseases/cwd/ (last updated Jan. 11, 2008).

¹⁹ Chronic Wasting Disease Alliance, *Recommendations for Hunters: Game Management Units, Wildlife Management Zones, and Counties Where CWD Has Been Detected in Wild Populations*, <http://www.cwd-info.org/index.php/fuseaction/recommendations.gmu> (last updated Aug. 29, 2007).

²⁰ *Id.* at *Carcass Transportation Regulations in the United States and Canada*, <http://www.cwd-info.org/index.php/fuseaction/policy.main> (accessed Apr. 13, 2008).

²¹ See e.g. *Bean v. Bredesen*, 2005 WL 1025767 at *4 (Tenn. App. May 2, 2005) (held that state ban on private possession of white-tailed deer did not violate the Commerce Clause because the state's interest in preventing the spread of CWD was legitimate); see also Brett Barrouquere, *Kentucky Elk Importation Law Challenged*, <http://www.wtopnews.com/?nid=111&sid=1330105> (Jan. 21, 2008) (discussing a suit challenging Kentucky's law banning the import of deer or elk).

²² See St. Envtl. Resource Center, *Issue: Chronic Wasting Disease*, <http://www.serconline.org/CWD/stateactivity.html> (accessed Apr. 13, 2008) (discussing state legislation passed in response to CWD); Bryan Oller, *Chronic Wasting Disease Hurts Elk Industry in Colorado*, <http://www.organicconsumers.org/madcow/hurts21902.cfm> (Feb. 19, 2002) (discussing Colorado regulation in response to CWD); David Pilz, *Charting the Colorado Plateau Revisited, Regional Management Issues*, <http://www.coloradocollege.edu/dept/EC/Faculty/Hecox/CPweb/issuespageCWD.htm> (Summer 2002) (discussing tension between elk ranchers and Colorado state agencies).

²³ See e.g. Or. Dept. of Fish and Wildlife, *Fish and Wildlife Commission Delays Elk Ranching Rule-Making*, <http://www.dfw.state.or.us/news/2007/jan/017.asp> (Jan. 12, 2007) (discussing the Commission's decision to deny petitions from both proponents and opponents of elk ranching to change the elk ranching rules).

²⁴ See e.g. Or. Admin. R. 635-056-0000 et seq. (2008) (regulating the importation and possession of nonnative wildlife).

²⁵ *Id.*

²⁶ Or. Admin. R. 635 056-0130(5) (2008) (establishes a Wildlife Integrity Review Panel).

As we cleaned up after that evening's gathering of state wildlife lawyers and our guests headed back to their home states, a quote from Wendell Berry's "Out of Your Car, Off Your Horse"²⁷ bubbled up from my subconscious. Although conventionally known as "wildlife management," perhaps the work of state wildlife agencies is more accurately described as the *regulation of human interaction with wildlife*. Given the inherent messiness of human nature, such work guarantees state wildlife lawyers an endless variety of legal issues with which to wrestle. Most of that wrestling will be done behind the scenes in the rough and tumble of state decision-making processes. As Berry put it,

[t]he real work of planet-saving will be small, humble, and humbling, and (insofar as it involves love) pleasing and rewarding. Its jobs will be too many to count, too many to report, too many to be publicly noticed or rewarded, too small to make anyone rich or famous.²⁸

To a state wildlife lawyer, that comes pretty close to the truth.

²⁷ Wendell Berry, *Out of Your Car, Off Your Horse*, in *Sex, Freedom, Economy and Community* 24 (Pantheon 1993).

²⁸ *Id.*